

No. 12,492

IN THE

United States Court of Appeals
For the Ninth Circuit

STEPHEN W. GERBER,

Appellant,

VS.

JACK E. MOLESWORTH,

Appellee.

Appeal from the United States District Court, Northern
District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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Appellant herewith answers certain of appellee's arguments which are erroneous.

- I. WHERE PLAINTIFF IS NOT NAMED IN A LIBELOUS PUBLICATION, HE MUST PROVE THAT SOME THIRD PERSON UNDERSTOOD THAT HE WAS THE PERSON REFERRED TO.

On pages 9 and 10 of appellee's brief the rule of law is stated that it is elementary that a writing need not contain the name of the defamed person in order to constitute a libel. Appellee further states that if the language used points a finger at the victim, that is enough.

In this connection appellant respectfully points out that appellee has confused matters of pleading with matters of substantive proof. The rule as stated by appellee is a rule of pleading, the standard of proof universally accepted in this situation is that a third party must have understood that the article was written of and concerning the defamed person, and that the libelous expressions referred to him. Thus, in pleading, plaintiff need not allege a third person understood the defamatory article was written of and concerning the plaintiff, but on the trial the plaintiff must prove this fact.

This distinction is precisely enunciated in *Dewing v. Blodgett*, 124 Cal. App. 100, 11 P. (2d) 1105. There defendant published an article accusing a Court reporter, not named, of feloniously falsifying a transcript. Plaintiff on the trial of the case proved that he was the official Court reporter of the Court referred to and testimony was offered by third parties that they knew and understood that the party referred to was the plaintiff.

The Court stated that "the fact that the name of the plaintiff was not contained in the libelous articles does not deprive the plaintiff of his remedy when those articles gave a description which was capable of directing attention to him, and when, as here, it was alleged and proved that readers of the articles understood them as referring to the plaintiff".

In the instant case, appellee failed to prove on the trial of the action that third persons understood the article of October 30th, 1948 referred to the appellee.

II. THOUGH THE IDENTITY OF THE PLAINTIFF IS REVEALED BY A SUBSEQUENT PUBLICATION IT REMAINS FOR PLAINTIFF TO PROVE THAT THIRD PERSONS UNDERSTOOD THE FIRST LIBEL WAS WRITTEN ABOUT HIM.

On pages 10 and 11 appellee argues that the second libel removed any doubt as to the identity of the victim. Assuming this to be true, it still would not obviate the necessity of plaintiff proving third persons understood the first libel was written about the plaintiff.

It is a fundamental concept that every individual libel is a separate and distinct tort, and consequently each must stand alone. A subsequent libel in which plaintiff is named is competent evidence only to identify him as the person defendant had in mind in the first article. This was the holding in *Russell v. Kelly*, 44 Cal. 641.

But a subsequent libel naming the plaintiff will not serve to prove that third persons initially understood the first article, in which plaintiff was not named as having been written about the plaintiff.

III. THE SECOND LIBEL STANDING BY ITSELF WILL NOT SUPPORT THE JUDGMENT.

On page 11 appellee contends that the second libel alone supports the judgment. Appellant cannot accede to this view.

The honorable trial Court in its findings specifically held that the article published on October 30, 1948 was libelous *per se* and injured plaintiff in his business and occupation. (Tr. 20, 21 and 22.)

In view of the Court's finding, under what theory can it be said that the second article alone supports the judgment? It is apparent that some portion of the damages assessed were predicated on the article of October 30, 1948.

From an examination of the findings and the transcript it is impossible to determine the apportionment the trial Court had in mind at the time the damages were assessed.

Appellee argues that the damages resulting from the second article are sufficient to support the judgment. The argument is erroneous for two reasons: First, because it is direct conflict with findings made by the trial Court, and second, it would require the Appellate Court to substitute its judgment on the facts for that of the trial Court.

CONCLUSION.

Appellant does not answer the remaining arguments made by appellee, because appellant considers such arguments to have been met in appellant's opening brief.

In view of the foregoing it is respectfully urged that the judgment of the Honorable District Court be reversed.

Dated, San Francisco, California,
September 20, 1950.

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